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In the Supreme Court of the United States

OCTOBER TERM, 1996

KO SAI-MAN AND CHUI KIM-CHUN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

5 pp

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Petitioners contend that the court of appeals erred in reversing the order of the district court dismissing a civil forfeiture action for lack of jurisdiction.

1. On September 20, 1991, the government filed a verified complaint *in rem* in the Eastern District of New York seeking forfeiture of assets, valued at between 1.5 and 3 million dollars, located in Hong Kong. The complaint alleges that the defendants *in rem* constitute proceeds of a conspiracy to smuggle heroin into the United States and to launder the proceeds of that smuggling, in violation of 21 U.S.C. 841 *et seq.* Pet. App. A3-A4.

On October 15, 1991, petitioners, who are citizens and residents of Hong Kong, filed a claim to the prop-

erty that did not challenge the district court's jurisdiction over the *res*. On April 6, 1992, petitioners sought dismissal of the complaint on the ground that no statute conferred jurisdiction on the federal courts over a *res* located outside the United States. The government in its response asserted, inter alia, that petitioners had waived this objection by failing to object to jurisdiction in their original claim and answer. Pet. App. A4-A5.

In October 1992, while petitioners' motion was under advisement, the statute conferring jurisdiction on federal courts over civil forfeiture proceedings was amended to provide district courts with *in rem* jurisdiction over a *res* located in a foreign country. Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1521, 106 Stat. 4062. The statute, 28 U.S.C. 1355, was amended by adding a new part (b), which provides in pertinent part that "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought" in the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred.

Following the enactment of this amendment, the parties presented arguments on the question whether the statute applied retroactively. The district court adopted a magistrate's report and recommendation, and dismissed the civil forfeiture action. Pet. App. B1-B42. The court concluded that the presumption against retroactive legislation was not overcome by a clear showing of congressional intent to make the amended Section 1355(b) retroactive. The court also

found (Pet. App. B32-B34) that retroactive application of the statute might violate the Ex Post Facto Clause of the Constitution.

The court of appeals reversed. Pet. App. A1-A17. Applying the principles enunciated in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court held (Pet. App. A8) that the application of the new amendment to 28 U.S.C. 1355 to civil forfeiture proceedings pending when the amendment became effective would be appropriate, because such application "would not take away any rights possessed by a party, increase liability, or attach new legal consequences to past conduct." The court also concluded (Pet. App. A16) that, in light of *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the retroactive application of the amendment would not raise a substantial doubt as to its constitutionality under the Ex Post Facto Clause.

2. Petitioners contend (Pet. 11-19) that the presumption against retroactive legislation bars application of amended 28 U.S.C. 1355(b) to forfeiture actions pending at the time of its enactment. Petitioners further contend (Pet. 19-26) that the retroactive application of 28 U.S.C. 1355(b) raises concerns under the Ex Post Facto Clause of the Constitution and that the provision must therefore be applied prospectively to avoid a constitutional question. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision is not a final judgment against petitioners. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners prevail in their claim to the *res*, their contention will be moot. If the *res* is forfeited to the government, petitioners can

appeal to the court of appeals raising any issues that may be available to them. If the court of appeals affirms the forfeiture, petitioners will then be able to present their present contentions to this Court, together with any other contentions they may have, in a petition for a writ of certiorari. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.